Office-Supreme Court, U.S.
FILED
NOV 3 1966
JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

October Term 1966

No. 742

MONDAKOTA GAS COMPANY,
a corporation,

Petitioners,

vs.

COLLINS G. REED and MRS. COLLINS G. REED,
et al,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

DARYL E. ENGEBREGSON
307 Fratt Building
Billings, Montana
Attorney for Petitioner

SUBJECT INDEX

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

	Page
Opinion Below	1
Jurisdiction	2
Questions Presented	2
Statutes Involved	3
Statement	4
Reasons for Granting the Writ	6
Argument	8
Conclusion	15

CASES CITED

	Page
Aetna Casualty & Surety Co. vs. Yeatts, 122 F2d 350	7, 11
Associated Press vs. U. S. (1945) 326 U. S. 1, 65 S. CT. 1416, 89 L. Ed. 2013	7, 9
Bergstrom vs. Johnson, 111 Minn. 247, 125 N. W. 899	13
Chesbrough vs. Vivard Inv. Co., 156 Ky. 149, 160 S. W. 725	12
Doehler Metal Furniture Co. vs. U. S. (CCA 2d, 1945) 149 F2d 130	7, 9
Elgin J. & E. Ry. Co. vs. Burley (1945) 325 U. S. 711, 65 S. CT. 1282, 89 L. Ed. 1886	7, 9
Elliot and Sons vs. King & Co., 22 F.R.D. 280,	7, 10
Fisher vs. Bush, 133 Ind. 315, 32 N. E. 924	13
Foster vs. Winstanley, 39 Mont. 314, 102 P. 574, 579	13
Fried vs. McGrath, 133 F2d 350	7, 10
Gile vs. Duke (9th Cir.) 5 F2d 952	7, 11, 12
Guerin vs. Sunburst Oil & Gas Co., 68, Mont. 129, P2d, 619	7, 11, 12
Hagen vs. U. S. (9th Cir.) 153 F2d 850	7, 11, 12
Hancock vs. McAvoy, 151 Pa. 439, 25 ATL 48	13
Hardue vs. Hayaski, 282 F2d 599	7
Helena & Livingston S. & R. R. Co., vs. Northern Pac. R. Co., 62 Mont. 281, 205 P. 224, 21. A.L.P. 1080	13
Ishikowa vs. Acheson, Secretary of State, 90 F. Supp. 713	7, 10
Jones vs. U. S., 279 F2d 433, Cert. Den. 81S. CT. 226, 364 U. S. 893, 5 L. Ed., 2d 190	7, 10

CASES CITED

Kelly vs. Graincy, 113 Mont. 520, 129 P 2d 619, 626 13
Loser vs. Savings Bank, 149 Iowa, 672, 128 N. W. 1101, 31 L.R.A. (N.S.) 1112 13
Peckham vs. Ronrico Corp., (CA 1st 1948) 171 F2 653 ..... 7, 9
Schumacher vs. Cole, 131 Mont. 166, 309 P. 311 8
Stephen vs. Patterson, 21 Ariz. 308, 188 Pac. 131 12
Taylor vs. Mitchell, 58 Kan. 194, 48 Pac. 859 ..... 12, 13
U. S. vs. Hardue Hayaski, 282 F 2, 599, 601 14
U. S. vs. Viewcrest Garden Apts., (1959) 268 F2d 380 ..... 7, 13
Waggoner vs. Dodson, 96 Tex. 415, 73 S. W. 517; 39 GYC. 1714 13
Whitaker vs. Coleman (CCA 5th 1940) 115 F2d 305 ..... 7, 10
White vs. Foster, 102 Mass. 375 13
Yale Oil Corp. vs. Sedlacek, 99 Mont. 411, 43 P.2d 887 13

STATUTES AND RULES

Section 63-204, Revised Codes of Montana 1947 ____ 3, 6, 8, 9, 14
73-201, Revised Codes of Montana, 1947 ____ 3, 6, 8, 11, 12
Section 73-202, Revised Codes of Montana, 1947 ____ 4, 7, 8, 11, 12
Section 93-1101-21, Revised Codes of Montana, 1947 ____ 4, 7
Section 93-3005, Revised Codes of Montana, 1947 ____ 4, 7, 8
Section 93-6205, Revised Codes of Montana, 1947 ____ 4, 7, 8
28 U.S.C.A. Section 1254 (1) ____ 2
28 U.S.C.A. 1652 ____ 6
27 F.R.C.P. ____ 7, 10
41(b) F.R.C.P. ____ 8
56 F.R.C.P. ____ 8, 9, 15
59(d) F.R.C.P. ____ 11

TEXT AUTHORITY

Moore's Vol. 6 ____ 11

In the Supreme Court of the United States

October Term 1966

No. _____

MONDAKOTA GAS COMPANY,
a corporation,

Petitioners,

vs.

COLLINS G. REED and MRS. COLLINS G. REED,
et al,

Respondents.

Petition for a Writ of Certiorai to the United States Court of Appeals for the Ninth Circuit

PETITION FOR CERTIORARI

Mondakota Gas Company, petitioner, prays that a writ of Certiorari issue to review the judgment and order of the Ninth Circuit Court dated August 2, 1966, affirming the judgment of the United States District Court for the District of Montana.

OPINION BELOW

The order affirming the judgment of the District Court is reported in 244 F Supp. 327.

JURISDICTION

The judgment of the Court of Appeals was entered on the 2nd day of August, 1966. The jurisdiction of this Court is invoked under 28 U.S.C.A., Section 1254 (1).

QUESTIONS PRESENTED

(1) If Respondent relies upon a dismissal of two prior cases as being res judicata does the evidence of such cases presented to the District Court, including the recorded contract made a part of the complaint and upon which the complaint is based, constitute proof of the contract so that the District Court, on a motion for Summary Judgment, is bound to the fact of recording and constructive notice thereof to a subsequent purchaser, i.e. the Respondent herein, so as to constitute a material issue of fact.

(2) If prior cases are settled by agreement, but not dismissed without prejudice, do the cases thereby become moot and not res judicata, so, that the District Court should receive evidence of a subsequent judgment in a third action on the same subject matter cancelling the recorded contract referred to in No. 1 above, which Decree shows the chain of title and which is recorded in accordance with the state law.

(3) Should the District Court have ordered discovery pending appeal when it is shown that the Respondent is a relative of the business partners of the defendant in prior cases, which were settled by agreement, from whom Respondent's title is obtained, when the conditional con-

tract was later cancelled by Court Decree by reason of the agreement which settled the cases referred to in No. 1, above.

STATUTES INVOLVED

Section 63-204, Revised Codes of Montana, 1947.

PARTNERSHIP CHARGED WITH KNOWLEDGE OF OR NOTICE TO PARTNER.

Notice to any partner of any matter relating to partnership affairs, and the knowledge of the partner acting in the particular matter, acquired while a partner or then present to his mind, and the knowledge of any other partner who reasonably could and should have communicated it to the acting partner, operate as notice to or knowledge of the partnership, except in the case of a fraud on the partnership committed by or with the consent of that partner.

73-201, Revised Codes of Montana, 1947.

RECORD—TO WHOM NOTICE RECORDING COPIES.

Every conveyance of real property acknowledged or proved, and certified and recorded as prescribed by law, from the time it is filed with the county clerk for record, is constructive notice of the contents thereof to subsequent purchasers, and mortgagees; and a certified copy of any such recorded conveyance may be recorded in any other county, and when so recorded the record thereof shall have the same force and effect as though it was of the original conveyance.

Section 73-202, Revised Codes of Montana, 1947, provides that the instrument first recorded prevails.

Section 93-1101-21, Revised Codes of Montana, 1947, provides that an instrument recorded in the county clerk's office is admissable in evidence.

Section 93-3005, Revised Codes of Montana, 1947, provides for the filing of a notice of pendancy of an action affecting the title to real property, commonly called a Lis Pendens which constitutes constructive notice from the time of filing. This is also provided for in Section 93-6205, Revised Codes of Montana, 1947.

STATEMENT

The District Court had jurisdiction because there is diversity of citienship and the amount in litigation exceeds $10,000.00. U.S.C.A. 1332.

The questions involved in this case are whether or not a material issue of fact remains so that summary judgment should not have been granted to the defendant Collins Reed, and secondly, whether or not a new trial should have been granted upon the motion for new trial which includes the question whether or not the District Court should have ordered further discovery procedure during the pendency of the appeal or during the period of hearing the motion for new trial.

These questions are raised first, by the motion for new trial as to the findings of the trial court and by appeal from the summary judgment herein, with reference to the chain of title of the defendant Collins Reed upon which the trial court predicated the judgment against

the plaintiff. A subsequent judgment of the District Court of the State of Montana in and for the County of Yellowstone, cause No. 28573, entitled Mondakota Gas Co. -v-Industrial Gas Inc., was entered and recorded in Book 665 of Judgments and Decrees, page —, on May 17, 1965, of Fallon County, Montana, wherein the property is located. This judgment cancelled a contract of sale by Petitioner against E. L. McElroy, who had assigned his interest therein to Industrial Gas. Co. The claim of Collins Reed is based on a transfer from McElroy of an oil and gas lease included in the contract, but which is subsequent to the recording of the contract. McElroy had obtained a second assignment of the oil and gas lease from other corporate officers when he stated he lost the first one, but which did not include a clause that it was subject to the contract. This was never recorded, nor were the later assignments to Buchtel and then to Reed. McElroy was a business partner of one Edward Markey, and he is the brother-in-law of Reed, and Buchtel was the brother-in-law of McElroy. Affidavits were filed showing this in support of the motion for a new trial.

In 1952 Petitioner agreed to sell property to McElroy, one parcel of which is the leasehold interest herein. The contract was recorded, and to comply with Federal regulations an assignment was given to McElroy subject to the terms of the recorded contract. McElroy said he lost it and obtained another one which he prepared but not reciting it to be subject to the recorded contract. In 1953 McElroy made the assignment mentioned above.

The chain of title begins within a common owner, the petitioner herein, who sold to E. L. McElroy under a conditional agreement covering the real property interest involved herein, situate in Fallon County, Montana, to-wit:

W½, Section 18, Township 8 North,
Range 60 East, M.P.M., and
NE¼, Section 25, Township 8 North,
Range 59 East, M.P.M.

RECORDED INSTRUMENTS

Mondakota Gas Co. Chain

Purchase Agreement from Mondakota Gas Company to E. R. McElroy dated June 17, 1952, recorded in Book 30, pages 4-24, records, Fallon County, Montana, recorded Jan. 12, 1953, at 9:35 a.m..

Collins Reed Chain

Purchase Agreement from Mondakota Gas Company to E. R. McElroy dated June 17, 1952, recorded in Book 30, pages 4-24, records, Fallon County, Montana, recorded Jan. 12, 1953, at 9:35 a.m.

There are assignments which were presented by Reed to the Secretary of Interior but which have never been recorded in the clerk's office.

REASONS FOR GRANTING THE WRIT

1. The writ should be granted because the District Court failed to follow the Montana law applicable to the recording instruments affecting real property (cases in 2 below) and is contrary to 28 U.S.C.A. 1652.

2. The decision is contrary to the following Montana law:

Sec. 63-204 RCM 1947; Sec. 73-201 RCM 1947; Sec.

73-202 RCM 1947; Sec. 93-1101-21 RCM 1947; Sec. 93-3005 RCM 1947; Sec. 93-6205 RCM 1947.

Guerin v. Sunburst Oil & Gas Co., 68 Mont. 365, 218, P. 949.

Kelley v. Grainey, 113 Mont. 520, 129 P. 2d 619.

3. The decision below is in conflict with the prior decision of the 9th Circuit, ie. U.S. v. Viewcrest Garden Apts., (1959) 268 F. 2d 380.

4. The decision is in conflict with other federal court decisions, ie. Peckham v. Ronrico Corp. (CA 1st 1948) 171 F2 653; Associated Press v. U.S. (1945) 326 U.S. 1, 65 S. Ct. 1416, 89 L. Ed. 2013; Elgin J. & E. Ry. Co. v. Burley (1945) 325 U.S. 711, 65 S. Ct. 1282, 89 L. Ed. 1886; Doehler Metal Furniture Co. v. U.S. (CCA 2d, 1945) 149 F2d 130; Whitaker v. Coleman (CCA 5th 1940) 115 F2d 305; Ishikowa v. Acheson, Secretary of State, 90 F. Supp. 713; Jones v. U.S., 279 F2d 433, Cert Den. 81S. Ct. 226, 364 U.S. 893, 5 L. Ed. 2d 190; and Hardue v. Hayaski, 282 F2d 599.

5. The decision is in conflict with other Federal Court decisions granting discovery pending on apeal and a new trial, ie. Elliot & Sons v. King & Co., 22 F.R.D. 280, applying Rule 27 F.R.C.P.; Fried v. McGrath, 133 F2d 350; Aetna Casualty & Surety Co. v. Yeatts, 122 F2d 350; Hagen v. U.S. (9th Cir.) 153 F2d 850; Gile v. Duke (9th Cir.) 5 F2d 952.

6. The decision denies to petitioner the right to a trial on the merits and issues joined by the application of the doctrine of res adjudicata where it is shown prima facia by the subsequent judgment that the two prior cases claim-

ing a breach of the agreement of purchase were settled by an assignment of the property in the contract to Industrial Gas Co. by McElroy, rendering the two prior cases moot.

ARGUMENT

This writer did not have the benefit of trying this case in the District Court, having been retained later for the motion for new trial. From examination of the lower court proceedings it appears that this is just one part, or claim, involved as other parties were involved concerning other claims.

It is the opinion of counsel that the substantive law applicable to the present case is so fundamental that perhaps prior counsel did not "hammer it home" in the lower court. The decision goes off on procedure, not recoginzing that the two prior cases to cancel the contract, which were presented by Reed to invoke res adjudicata under Rule 41 (b), included the recorded contract which is prior in time to the attempted assignment by McElroy to his business partner and relation. See Secs. 73-201, 73-202, 63-204, 93-3005 and 93-6205 RMC 1947, regarding constructive notice, notice to a partner and lis pendens. A quiet title action and lis pendens is proper Montana procedure to litigate oil and gas leases and royalties. Schumacher v. Cole, 131 Mont. 166, 309 P. 311.

The trial court had the proof of the recorded contract before it, and this created a material issue of fact which precludes the granting of a Summary Judgment under Rule 56. In addition, the motion for a new trial shows the time and fact of the business partnership and relation-

ship of the assignees of McElroy, who had died before the trial court judgment, and by Sec. 63-204 R.C.M. 1947, the notice of the contractual obligations of conditional purchase are imputed, so as to preclude any assignee from being a bona fide purchaser. Also, the contract was of record and this creates constructive notice.

"Rule 56 should be cautiously invoked to the end that the parties may always be afforded a trial where there is a bona fide dispute of facts between them." **Associated Press v. United States (1945), 326 U.S.I., 65 S. Ct. 1416, 89 L. Ed. 2013.**

"If there was any question of fact presented on the record in the proceedings for summary judgment, the motion could not be sustained." **Elgin J. & E. Co. v. Burley (1945), 325 U. S. 711, 65 S. Ct. 1282, 89 L. Ed. 1886.**

"A litigant has a right to a trial where there is the slightest doubt as to the facts." **Peckham v. Ronrico Corp. (1948 C. A. 1st), 171 F. 2d 653, 657.**

"We take this occasion to suggest that trial judges should exercise great care in granting motions for summary judgment. **A litigant has a right to a trial where there is the slightest doubt as to the facts,** and a denial of that right is reviewable; but refusal to grant a summary judgment is not reviewable. Such a judgment, wisely used, is a praiseworthy timesaving device. But, although prompt despatch of judicial business is a virtue, it is neither the sole nor the primary purpose for which courts have been established. Denial of a trial on disputed facts is worse than delay. **The district courts would do well to note that time has often been lost by reversals of summary judgments improperly entered." Doehler Metal Furniture Co. v. United States (CCA 2d, 1945), 149 F 2d 130, 135.** (Emphasis supplied.)

". . . Summary judgment procedure is not a catch

> penny contrivance to take unwary litigants into its toils and deprive them of a trial, it is a liberal measure, liberally designed for arriving at the truth. **Its purpose is not to cut litigants off from their right of trial by jury if they really have evidence which they will offer on a trial,** it is to carefully test this out, in advance of trial by inquiring and determining whether such evidence exists." **Whitaker v. Coleman (CCA 5th 1940), 115 F 2d 305.** (Emphasis supplied.)

There was newly discovered evidence which could only be found to exist by facts available in states other than Montana as the attempted assignees are not Montana residents. This is apparent because there is diversity of citizenship for federal jurisdiction.

> ". . . The showing of the alleged newly discovered evidence need not present an air-tight case. It suffices if a showing is made of sufficient new facts to afford a basis for believing that, given an opportunity, the concrete proof could reasonably be expected to cover the gaps and to fill in the details. I believe such a showing has been made here, and it can be left to the matter of proof to supply the specific details." **Ishikawa v. Acheson, Secretary of State, 90 F. Supp. 713.**

> "This remedial procedure, a motion for a new trial based upon after-discovered evidence, is designed to serve the ends of justice." **Jones v. U. S. 279 F 2d 433, cert. den. 81 S. Ct. 226, 364 U. S. 893, 5 L. Ed. 2d 190.**

In Elliot & Sons v. King & Co., 22 F.R.D. 280, at page 282, it was said that the District Court should order discovery under Rule 27 even though there is an appeal pending.

In the case of Fried v. McGrath, 133 F. 2 350, Judge

Edgerton made the hereinafter quoted observation by granting a new trial on grounds not stated in the original motion, which quotation is set forth in Moore's, Vol. 6, page 3850, as follows:

> "'There is no logical or legal difficulty in granting for one reason a motion made for another reason. And it seems to me a contradiction in terms to say, when a judge grants a party's motion, that he nevertheless acts upon his own motion; or, what comes to the same thing, that he acts of his own initiative. If he grants the party's motion he does not act of his own initiative; and vice versa.' Rule 59(d) clearly expresses this dichotomy: 'the court of its own initiative may order a new trial for any reason for which it might have granted a new trial on motion of a party . . .'"

In Aetna Casualty & Suretoy Co. v. Yeatts, 122 F. 2 350, Judge Parker stated as follows:

> "'To the federal trial judge, the law gives ample power to see that justice is done in causes pending before him; and the responsibility attendant upon such power is his in full measure. While according due respect to the findings of the jury, he should not hesitate to set aside their verdict and grant a new trial in any case where the ends of justice so require.'" (Emphasis supplied.)

The case of Hagen v. U. S., 9th Circuit, 153 F. 2 850, and Gile v. Duke, 9th Circuit, 5 F. 2 952, the plaintiff was allowed to reopen his case after a nonsuit so as to supply certain defects and omissions in his proof.

In the case of Guerin v. Sunburst Oil & Gas Co., 68 Mont. 365, 218 P. 949, at page 951, it was stated as follows (See Sec. 73-201 and 73-202 R.C.M. 1947):

The subsequent judgment rendered the two prior cases

moot by reason of the assignment by McElroy to Industrial Gas Co. Perhaps prior counsel should have moved to dismiss without prejudice, but to hold that even though a controversy is settled it really isn't, in effect nullifies all forms of reason and common sense and does not do the justice required by law.

The case of Hagen v. U. S., 9th Circuit, 153 F. 2 850, and Gile v. Duke, 9th Circuit, 5 F 2 952, the plaintiff was allowed to reopen his case after a nonsuit so as to supply certain defects and omissions in his proof.

In the case of Guerin v. Sunburst Oil & Gas Co., 68 Mont. 365, 218 P. 949, at page 951, it was stated as follows (See Sec. 73-201 and 73-202 R.C.M. 1947):

> "In the instant case the option recorded in the Miscellaneous Record Book was recorded as prescribed by law." Stephen v. Patterson, 21 Ariz. 308, 188 Pac. 131.
>
> "Since the option was an instrument entitled to be recorded, and was recorded as prescribed by law, it imparted constructive notice of its contents of Mrs. Guerin, who was a subsequent purchaser of the property affected by the option, from the time it was filed with the county clerk of Toole County on December 9, 1921. Section 6934, above. One who purchases land from the owner, after the recording of an option given by the owner to another person to purchase the same land, takes with constructive notice of the option, and cannot claim to be an innocent purchaser. Chesbrough v. Vivard Inv. Co., 156 Ky. 149, 160 S.W. 725. The option recited that the right to purchase given to Rock was 'subject, however, to one certain oil and gas lease given in favor of Gordon Campbell,' and that recital constituted a part of the contents of the option as the term 'contents' is used in section 6934 above. Taylor v.

Mitchell, 58 Kan. 194, 48 Pac. 859. But Mrs. Guerin was chargeable also with notice of all material facts which an inquiry suggested by that recital would have disclosed. Fisher v. Bush, 133 Ind. 315, 32 N.E. 924; Loser v. Savings Bank, 149 Iowa, 672, 128 N.W. 1101, 31 L.R.A. (N.S.) 1112; 2 Tiffany on Real Property, § 572. In other words, she was chargeable with notice of the contents of the Campbell lease, though it was not recorded (White v. Foster, 102 Mass. 375; Hancock v. McAvoy, 151 Pa. 439, 25 Atl. 48; 2 Tiffany on Real Property, § 572), and she could not rely upon the representation by Mrs. Thornton that there was not any outstanding lease upon the property (Bergstrom v. Johnson, 111 Minn. 247, 125 N.W. 899; Waggoner v. Dodson, 96 Tex. 415; 73 S.W. 517; 39 Cyc. 1714)." (Emphasis supplied.)

In Kelly v. Grainey, 113 Mont. 520, 129 P 2d 619, at 626, it is stated as follows:

"In the words of Chief Justice Brantley in Foster v. Winstanley, 39 Mont. 314, 102 P. 574, 579, 'a bona fied purchaser is one who at the time of his purchase advances a new consideration, surrenders some security, or does some other act which leaves him in a worse position if his purchase should be set aside,'' etc. Helena & Livingston S. & R. R. Co. v. Northern Pac. R. Co., 62 Mont. 281, 205 P. 224, 21 A.L.P. 1080; Yale Oil Corp. v. Sedlacek, 99 Mont. 411, 43 P. 2d 887.

"Thus, even if we consider defendant's testimony as showing that she received plaintiff's property from Mae J. Kelly in good faith in consideration for a promise to support their mother, she was not a bona fide purchaser so as to defeat plaintiff's title."

The case of United States v. Viewcrest Garden Apartments, (9th Cir. 1959) 268 F. 380, holds that the state recording law governs, and stated thusly (on pages 382 and 383):

"• • • Thus state recording acts interfere with no federal policy as there is no federal recording system for the type of mortgages here involved. It is commercially convenient to adopt existing state systems as it saves the expense of setting up a whole new federal recording system and it enables persons checking ownership interests in property to refer to one set of record books rather than two."

The rule is that any recorded instrument under state law imports notice to any subsequent purchasers or encumbrancers. The recorded contract between plaintiff and McElroy put defendant on notice so that he cannot be a bona fide purchaser.

A partner is charged with knowledge of what the other partner knows. Sec. 63-204 R.C.M. 1947. The terms of the purchase agreement of McElroy on June 17, 1952, are chargeable to Markey. Since Markey is a brother-in-law of appellee Collins Reed, and Buchtel the brother-in-law of McElroy, it is obvious the chain of title is between business associates and relatives. These parties cannot be bona fide purchasers, especially since they all have notice, actual or constructive, by the recording of the purchase agreement to McElroy, which he assigned to Industrial Gas and which was terminated.

The issue of who is the record owner, or who is entitled to the leasehold interest has always been involved in the case. The motion for new trial as amended, supplied the proof that the two prior cases were not in fact res adjudicata and also proved the entire chain of title.

"In federal practice any question which has been presented to the trial court for a ruling and not thereafter waived or withdrawn is preserved." U. S. v. Hardue Hayaski, 282 F 2, 599, 601.

The record in this case is complex and cluttered because it involved other unrelated claims. Perhaps all of them should not have been joined, but that should not preclude a litigant from consideration of all offered evidence, whether it be "hidden" behind an order of dismissal in the pleadings of other cases (ie. the contract of June 17, 1952) or newly discovered and presented at a motion for new trial.

CONCLUSION

The petitioner respectfully contends that on the basis of the record the trial court, in the aid of the appeal, and in aid of the motion for new trial should have granted the appellant's motion for discovery procedure. In addition, it would appear that under Rule 56, the trial court should have granted summary judgment, and should have granted summary judgment, in favor of the petitioner, Mondakota Gas Co., for the reason that the chain of title, as recorded in the County Clerk and Recorder's office at Fallon County, Montana, shows the interest and ownership of Mondakota Gas Co. and the subsequent purchasers and particularly Collins G. Reed could receive only the interest that E. L. McElroy had and that was taken with notice of the prior recorded rights of the petitioner.

The motion for new trial seeks to show to the Court that there was fraud, failure of consideration, and actual knowledge of the facts by Reed and his predecessors in his chain of title. This, and the recorded contract, would require the court to reach a different conclusion, i.e., that plaintiff is entitled to judgment for the entire

interest of the Walker lease, subject only to the operating agreement.

Reed's title is predicated upon his predecessors title and the title of E. L. McElroy stops at the point of the contract of purchase recorded in Fallon County, Montana, which contract was assigned and then terminated and reinvested petitioner with his title.

It is respectfully submitted that this petition for a Writ of Certiorari should be granted.

DARYL E. ENGEBREGSON,
Attorney at Law
307 Fratt Building
Billings, Montana

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing Petition for Writ of Certiorari upon all other parties, to-wit:

CALE J. CROWLEY, Esq.
CROWLEY, KILBOURNE, HAUGHEY,
HANSON & GALLAGHER
500 Electric Building
Billings, Montana 59101
Counsel for Reed

at the address shown above by mailing six true and correct copies thereof, postage prepaid, this 28th day of October, 1966, pursuant to Rule 33 (3) (b) of the Rules of the Supreme Court of the United States.

Marvel Lowrance

Marvel Lowrance, Sec. for
DARYL E. ENGEBREGSON
307 Fratt Building
Billings, Montana
Attorney for Petitioner

APPENDIX

INDEX

Opinion 244 F. Supp. pg. 327, 331, 332 ..... 17, 18, 19, 20

Opinion CCA No. 20, 402 21

Order Extending Time 22

Subsequent Judgment in Mondakota Gas Co.

Case regarding contract and lease and rendering prior cases moot 23, 29

MONDAKOTA GAS COMPANY, Plaintiff.

v.

COLLINS G. REED, et al., Defendants.

S-W COMPANY, a corporation, Plaintiff,

v.

FIDELITY GAS COMPANY, a corporation et al., Defendants.

The FIRST NATIONAL BANK OF DENVER, COLORADO, a corporation, Trustee, Plaintiff,

v.

FIDELITY GAS COMPANY, a corporation, et al., Defendants.

Nos. 354-356.

United States District Court
D. Montana
Billings Division.

Aug. 3, 1964

On Motion for New Trial
June 4, 1965.

(That portion that refers to the Reed matter)

On Motion for New Trial of No. 354.

Plaintiff's motion to amend motion for new trial, filed April 1, 1965, is granted and the motion for a new trial is deemed amended in accordance with such motion to amend.

And the court having considered said motion for a new trial as amended, together with the affidavits and briefs in support of and in opposition to said motion,

and being fully advised in the premises,

Now, therefore, it is order and this does order that said motion for new trial as amended be and the same is hereby denied.

And the court having considered plaintiff's motion for leave to take depositions in support of motion for new trial, together with the affidavits and briefs in support of and in opposition to said motion, and being fully advised in the premises,

Now, therefore, it is ordered that said motion be and the same is hereby denied.

Summary Judgment was granted in this case and two companion cases involving similar issues in favor of all the defendants. The present motion for a new trial as amended appears to be directed only to the defendant Collins G. Reed in this case. The alleged grounds for the motion are newly discovered evidence and that there is a genuine dispute as to a material fact which would preclude the court's granting summary judgment in favor of the defendant Reed. The alleged dispute as to a material fact is said to be the validity of an assignment of the so-called Walker oil and gas lease from the plaintiff to one E. R. McElroy, dated December 5, 1952, and subsequent assignments from McElroy to Buchtel, and from Buchtel to the defendant Collins G. Reed. The depositions and discovery procedure, sought to be taken in support of the motion for a new trial, seem to deal only with the issue of the validity of the assignments from McElroy to Buchtel and from Buchtel to Reed.

In this connection it must be pointed out that if the assignment from the plaintiff to McElroy was valid, the validity of the subsequent assignments from McElroy to Buchtel and from Buchtel to Reed are immaterial as

far as the plaintiff is concerned, because if its assignment to McElroy was valid, it no longer had any interest in the oil and gas lease (except such as is preserved to the plaintiff in the judgment), and has no standing to question the subsequent assignments.

This attempt to question the validity of the assignment from the plaintiff to McElroy is made in this case for the first time on the motion for a new trial. The validity of the assignment to McElroy was not mentioned as an issue in either the pre-trial order filed October 23, 1963, or the plaintiff's motion to modify the pre-trial order which was filed December 12, 1963. As a matter of fact, at a pre-trial conference, plaintiff's then counsel conceded that the title of all of the defendants in this and the two companion cases was settled by the decision of this court in Cedar Creek Oil and Gas Company, et al., v. Fidelity Gas Co., et al., which was affirmed by the Court of Appeals in 249 F.2d 277. At that pre-trial conference the attorney for the plaintiff stated that plaintiff in this and the two companion cases was relying on breaches of the Fidelity Operating Agreements which were alleged to have occured subsequent to the final judgment in the Cedar Creek Oil and Gas case. The attack on the validity of the assignment of the Walker lease by the plaintiff to McElroy for the first time on the motion for a new trial appears to be an afterthought and that reason alone would warrant the denial of the motion for a new trial.

(5) However, the motion must be denied for another reason. In cause No. 1557 in this court, the plaintiff Mondakota Gas Company instituted an action against E. L. (Sic) McElroy, et al., to set aside the assignment of the oil and gas lease. That action was commenced Novem-

ber 4, 1953, and was dismissed for lack of prosecution on October 11, 1961. Such dismissal for want of prosecution is an adjudication on the merits under the provisions of Rule 41(b) of the Federal Rules of Civil Procedure. That action, No. 1557, is res judicata on the question of the validity of the assignment from Monadkota Gas Co. to E. L. (Sic) McElroy and the plaintiff cannot relitigate that issue in this case.

(6) Since, for the foregoing reasons, the validity of the Mondakota assignment to McElroy is established, the subsequent assignments from McElroy to Buchtel and from Buchtel to Reed are of no concern to the plaintiff and any depositions of discovery relating to the subsequent assignments would avail the plaintiff nothing. Likewise, the alleged newly discovered evidence offered as a ground for the motion for a new trial appears to go to the issue of the validity of the subsequent assignments, and does not assist the plaintiff.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Mondakota Gas Company, a corporation,

Appellant,

vs.

Collins G. Reed, and Mrs. Collins G. Reed, his wife, if any; et al.,

Appellees.

No. 20,402

(August 1, 1966)

On Appeal from the United States District Court for the District of Montana, Billings Division.

Before: HAMLEY and JERTBERG, Circuit Judges, and THOMPSON, District Judge.

PER CURIAM:

The judgment and orders under review on this appeal are, and each of them is, affirmed for the reasons stated in the opinion of the district court reported in 244 F. Supp. 327.

SUPREME COURT
OF THE UNITED STATES

No. _____, October Term, 1966

MONDAKOTA GAS CO.,

Petitioner,

v.

COLLINS G. REED, ET AL.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

Upon Consideration of the application of counsel for petitioner,

It Is Ordered that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including November 4, 1966.

/s/ William J. Brennan, Jr.
Associate Justice of the Supreme
Court of the United States

Dated this 1st day of
November, 1966.

IN THE DISTRICT COURT OF THE THIRTEENTH JUDICIAL DISTRICT COURT OF THE STATE OF MONTANA IN AND FOR THE COUNTY OF YELLOWSTONE

MONDAKOTA GAS COMPANY, corporation, Plaintiff, vs. INDUSTRIAL GAS INC., a corporation, Defendant.	No. 28573 Findings of Fact, Conclusions of Law, and Judgment and Decree

This matter came on regularly for trial before the court sitting without a jury on the 22nd day of April, 1965, at 9:30 o'clock a.m., the plaintiff corporation appearing in person by its officers and by its attorney of record, Daryl E. Engebregson, and the defendant not appearing in person by its officers or by attorney, pursuant to Notice of Trial duly made and entered herein.

The court proceeded to examine the files and records herein and it appearing therefrom that the case was heretofore set for trial by the court and Notice of Trial duly made and given to the defendant and to the defendant's then attorney of record and it appearing that the defendant not appearing at all at the time set for trial and on motion of the above-named plaintiff the default of the defendant for its failure to appear at the time of trial was duly entered herein according to law.

WHEREUPON, witnesses were sworn and examined on behalf of the plaintiff, and the court having received oral testimony and documentary evidence in proof of the allegations of the plaintiff's complaint without any legal objection thereto and the court having considered such

pleadings and evidence and being fully advised in the premises, makes the following:

FINDINGS OF FACT

1. This action was commenced, as appears in the amended complaint, for the purpose of obtaining judgment against the defendant for the cancellation and termination of a certain purchase agreement between the parties, for the restoration to the plaintiff of all the properties, rights, contracts and oil and gas leases mentioned in said purchase agreement, or for money damages for the reasonable value of any such properties which cannot be restored to the plaintiff.

2. That none of the property described in the purchase agreement has been restored to the plaintiff, or can be restored to the plaintiff, except as hereinafter set forth, and that all of said property, except as hereinafter set forth, has been lost to the plaintiff either by disposition by the defendant or by failure of the defendant to make certain agreed payments on mortgages, or, in the gas and oil leases, by failure to pay rentals, or by failure to pay service and transportation charges, or otherwise causing and permitting said leases and contracts to be cancelled and terminated.

3. That notice of default to cancel and terminate said purchase agreement was duly given by the plaintiff to the defendant.

4. That the plaintiff made advances in behalf of the defendant by agreement with the defendant for the obligations of defendant which defendant failed to pay in the total sum of $23,765.20.

5. That all of the allegations of the plaintiff's complaint are true.

7. The property described in the purchase agreement and not lost to the plaintiff as hereinabove mentioned are the oil and gas leases commonly known as the Kraeger Lease together with the producing gas well covering gas rights above 2,000 feet including casing, meter house and equipment incidental to said gas well, the Federal Land Bank of Spokane Lease together with a producing gas well above 2,000 feet including casing, meter house and equipment incidental thereto, the Midland Realty Co. of Minnesota Lease together with producing gas well above 2,000 feet including casing, meter house and equipment incidental thereto, and the Walker Lease, known as Federal Lease, Billings, Montana, Serial No. 025.001, for oil and gas which are hereinafter described.

8. That the hereinabove mentioned leases are included in the purchase agreement between the plaintiff, Mondakota Gas Company, and the defendant, Industrial Gas, Inc., dated June 20, 1953, and is duly recorded in the records of the County Clerk & Recorder of Fallon County on May 29, 1954, in Book 34 of Misc. records on page 367.

9. That the hereinabove described leases are included in that certain purchase agreement between the plaintiff, Mondakota Gas Company, and one E. R. McElroy, bearing date of June 17, 1952, and duly recorded in the records of the County Clerk & Recorder of Fallon County on January 12, 1953, in Book 30 of Misc. records on page 4, and that said E. R. McElroy duly assigned all of said leases, pursuant to agreement to include said leases within the purchase agreement between the plaintiff and defendant hereinabove mentioned by written

assignment and quit claim bearing date of July 20, 1953, to the defendant Industrial Gas, Inc., which assignment and quit claim was a transfer and assignment of the leases made by partial assignment by the plaintiff to the said E. R. McElroy bearing date of August 11, 1952, which recites that said assignments were made subject to the terms of that certain purchase agreement bearing date of June 17, 1952, hereinabove mentioned.

10. That the plaintiff was the record owner of the leases hereinafter described and which were included in and described in the purchase agreement hereinabove mentioned and as between the parties hereto was the owner of the interest set forth in said lease in the realty dscribed in the said contracts which leases and contracts were duly recorded by reason of the following instruments and documents on file and of record in the office of the County Clerk & Recorder of Fallon County, Montana, and are in full force and effect as follows:

4. A. FEDERAL LEASE, BILLINGS, MONTANA, SERIAL NO. 025 001, base lease dated February 13, 1935, from the United States of America to L. M. Walker filed in the United States Bureau of Land Management records at Billings, Montana.

B. Assignment from Leona M. Walker to Mondakota Gas Co. dated August 25, 1948, and recorded in Fallon County, Montana, County Clerk & Recorders office on January 20, 1949, in Book 21, Misc., page 124.

C. Purchase agreement between Mondakota Gas Co. to E. R. McElroy dated June 17, 1952, recorded in Fallon County, Montana, County Clerk & Recorders office in Book 30, Misc., page 4, on January 12, 1953,

Partial assignment from Mondakota Gas Co. to E. R. McElroy subject to the terms of the purchase agreement dated June 17, 1952, and the assignment was recorded August 11, 1952. The interest in this purchase agreement and lease is assigned to Industrial Gas, Inc. by instrument dated July 20, 1953.

D. Purchase Agreement dated July 20, 1953, from Mondakota Gas Co. to Industrial Gas Co., recorded May 29, 1954, in Fallon County, Montana, County Clerk & Recorders office in Book 34, Misc., page 367.

The Federal Lease property is particularly described as follows, situated in Fallon County, Montana, to-wit: Tract A: The West Half (W½) of the Northeast Quarter (NE¼) and the Southeast of the Northeast Quarter (SENE¼) of Section Twenty-five (25), Township Eight (8) North, Range Fifty-nine (59) East, M.P.M.; and Tract B: The Northeast Quarter (NE¼) of the Northeast Quarter (NE¼) of Section Twenty-five (25), in Township Eight (8) North, Range Fifty-nine (59) East, M.P.M.; and Lots One (1), Two (2), Three (3) and Four (4), (W½W½), and East Half (E½) of the West Half (W½) of Section Eighteen 18) in Township Eight (8) North, Range Sixty (60) East, M.P.M., subject to the gas unit plan number five (5) covering the gas rights above a depth of 2,000 feet which is the strata commonly known as Judith River Sands and subject to any rights which now may exist under the deep test contract covering the oil rights below 2,000 feet which deep test contract was subleased to Shell Oil Company.

From the foregoing Findings of Fact, the court makes the following:

CONCLUSIONS OF LAW

1. That by reason of the breach of the purchase agreement between plaintiff and defendant, property of the value of $1,019,000.00 has been lost to the plaintiff and the further sum of $23,765.20 has been paid by plaintiff for defendant to plaintiff's damages in that amount and plaintiff is entitled to a judgment against defendant for damages in the said total sum of $1,042,765.20, and that plaintiff is entitled to cancellation and termination of said purchase agreement and to be restored to the ownership, title and right of possession to the leases set forth in Findings of Fact and to the gas wells, casings, meter houses, equipment incident to said gas wells on the three leases set forth in the Findings of Fact, namely: a gas well on the Kraeger Lease, a gas well on the Federal Land Bank of Spokane Lease, and a gas well on the Midland Realty Company of Minneapolis Lease.

JUDGMENT & DECREE

WHEREFORE, by reason of the law and the evidence,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the plaintiff, Mondakota Gas Company, as follows:

1. That the purchase agreement between Mondakota Gas Company and Industrial Gas, Inc., dated the 20th day of July, 1953, and recorded in Book 34, Misc., page 367, be, and the same hereby is, terminated, cancelled and of no force and effect.

2. That the plaintiff, Mondakota Gas Company, have and recover judgment against the defendant Industrial Gas, Inc., a corporation, in the sum of $1,042,765.20 to-

gether with plaintiff's costs and disbursements herein in the amount of $.

3. That, as between the parties hereto, the plaintiff, Mondakota Gas Company, is the owner of and entitled to the title, right and possession of the oil and gas leases on the realty located in Fallon County, Montana, hereinabove described in paragraph number 10 of the Findings of Fact herein which descriptions are hereby incorporated into this Decree to the rights therein enumerated, together with the producing gas wells on the said Kraeger Lease, Federal Land Bank of Spokane Lease, and Midland Realty Company of Minneapolis Lease, including the casings, meters, meter houses and equipment incident to and included in said three gas wells, and that all of said properties are free and clear of any right, title, interest or claim of the defendant herein.

Done in open court this 12th day of May, 1965.

E. E. FENTON
District Judge

Office-Supreme Court, U.S.
FILED
NOV 21 1966
JOHN F. DAVIS, CLERK

In the Supreme Court

of the

United States

October Term 1966

No. 742

MONDAKOTA GAS COMPANY,
a corporation,

Petitioner,

vs.

COLLINS G. REED,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Brief of Respondent Reed In Opposition

CALE CROWLEY
500 Electric Building
P. O. Box 2529
Billings, Montana 59103
Attorney for Respondent Reed

In the Supreme Court

of the

United States

October Term 1966

No. 742

MONDAKOTA GAS COMPANY,
a corporation,

Petitioner,

vs.

COLLINS G. REED,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Brief of Respondent Reed In Opposition

CALE CROWLEY
500 Electric Building
P. O. Box 2529
Billings, Montana 59103
Attorney for Respondent Reed

INDEX

	Page
OPINION BELOW	1
JURISDICTION	2
STATUTES INVOLVED	2
QUESTIONS PRESENTED	3
STATEMENT	4
A. CHRONOLOGY OF THIS CASE	4
B. MOTION FOR NEW TRIAL	10
ARGUMENT	14
A. A WRIT OF CERTIORARI IS NOT GRANTED TO REVIEW MATTERS OF EVIDENCE, NOR TO AFFORD A REHEARING ON APPEAL FOR THE BENEFIT OF ANY PARTICULAR INDIVIDUAL	14
B. ON THE RECORD, DISTRICT COURT HAD NO ALTERNATIVE BUT TO GRANT SUMMARY JUDGMENT	14
C. ON THE RECORD, THE DISTRICT COURT HAD NO ALTERNATIVE BUT TO DENY THE MOTION FOR NEW TRIAL	15
D. NO MONTANA STATUTES WERE INVOLVED PRIOR TO SUMMARY JUDGMENT	18
E. NO CONFLICT OF DECISIONS	18
CONCLUSION	21

INDEX OF AUTHORITIES

Page

CASE AUTHORITY:

A. *UNITED STATES SUPREME COURT.*

Associated Press v. United States (1945), 326 U.S. 1, 65 S. Ct. 1416, 89 L. Ed. 2013 19

Cedar Creek Oil and Gas Company, et al., v. Fidelity Gas Co., et al., 1957, 9th C.C., 249 F. 2d 277, cert. den. 78 S. Ct. 775, 356 U.S. 932, 2 L. Ed. 763 16

Magnum Import Co. v. Coty, 262 U.S. 159, 163, 67 L. Ed. 922, 43 S. Ct. 531 14

Rice v. Sioux City Memorial Park Cemetery, 75 S. Ct. 614, 349 U.S. 70, 99 L. Ed. 897 14

B. *NINTH CIRCUIT COURT.*

First National Bank v. First Bank Stock Co., 1962, 9th C.C., 306 F. 2d 937 15

Gile v. Duke, 1925, 9th C.C., 5 F.2d 952 21

Likins-Foster Monterey Corporation v. United States, 1962, 9th C.C., 308 F. 2d 595 at 599 15

Moylan v. Siciliano, 1961, 9th C.C., 292 F. 2d 704 at 705-706 17

Pacific Contact Laboratories, Inc., v. Solex Laboratories, Inc., 9th C.C., 209 F. 2d 529 at 533, cert. den. 75 S. Ct. 26, 348 U.S. 816, 99 L. Ed. 643 17

Smith v. Stone, 1962, 9th C.C., 308 F. 2d 15 at 18 15

United States v. Bransen, 9th C.C., 142 F. 2d 232 at 235 17

INDEX OF AUTHORITIES (Cont.)

Page

C. *MONTANA CASE.*

Humble v. St. John, 72 Mont. 519, 234 Pac. 475 18

OTHER AUTHORITY:

Rule 41(b), Federal Rules of Civil Procedure 2-3

Rule 56(e), Federal Rules of Civil Procedure 2, 15

Rule 41(b) Montana Rules of Civil Procedure 3

Section 1332, Title 28, U.S.C.A. 5

In the Supreme Court

of the

United States

October Term 1966

No. 742

MONDAKOTA GAS COMPANY,
a corporation,

Petitioner,

vs.

COLLINS G. REED,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

Brief of Respondent Reed In Opposition

OPINION BELOW

The opinion of the District Court is reported in *244 F. Supp. 327.* The opinion of the Ninth Circuit Court affirming in two companion cases consolidated for trial is reported in *349 F. 2d 1020;* and in this particular case in *363 F. 2d 879.*

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on August 2, 1966. There was no petition for rehearing in the Ninth Circuit. Ninety days expired October 31. Notice from petitioner served on respondent advises the petition for a writ was filed in this court November 3, three days late. This court has no jurisdiction — *28 U.S.C.A. 2101 (c).*

STATUTES INVOLVED

No constitutional provisions, treaties, ordinances or regulations are involved. The petition for a writ recites five statutes of the *Revised Codes of Montana, 1947,* which petitioner says are involved. The statutes cited have no relevance or bearing whatsoever in this case.

The following portions of the *Federal Rules of Civil Procedure* and the *Montana Rules of Civil Procedure* are pertinent.

Rule 56(e), Federal Rules of Civil Procedure, provides in part:

> "(e) FORM OF AFFIDAVITS; FURTHER TESTIMONY; DEFENSE REQUIRED. * * * When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him."

Rule 41(b) provides in part:

"(b) INVOLUNTARY DISMISSAL: EFFECT THEREOF. * * * Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or for improper venue or for lack of an indispensable party, operates as an adjudication upon the merits."

Rule 41(b), Montana Rules of Civil Procedure, is identical word for word with *Rule 41(b), Federal Rules of Civil Procedure* quoted above.

QUESTIONS PRESENTED

We do not agree that the questions listed in the petition for writ of certiorari are in fact presented, or that they were or are questions over which this court should take cognizance. The District Court in a quiet title action brought by petitioner granted a motion for summary judgment, and then subsequently denied a motion for new trial and several motions amending the original motion for new trial. The only questions presented to the Ninth Circuit Court and involved here were:

(1) Whether there was any issue of fact in the District Court as of the date when the summary judgment was granted, and whether the Court of Appeals properly affirmed that judgment.

(2) Whether there was any abuse of discretion by the District Court in denying the motion for new trial, and the several amending motions, and whether the Court of Appeals erred in

holding that there was no abuse of discretion by the District Court and in sustaining the action of the District Court in denying the said motions for new trial.

STATEMENT

We recognize that present counsel for petitioner did not appear in the case in the District Court prior to the summary judgment of August 31, 1964, that it was a new and different counsel who first filed the motion for summary judgment on September 9, 1964; and that present counsel did not get into the case until March 16, 1965, the date set for hearing on the motion for new trial. This may account for his lack of information on the detailed chronology of what took place in the case. Nevertheless, we cannot agree that the petitioner's statement in his application for writ of certiorari of the posture of the case at the time it was presented to the District Court for summary judgment is either accurate or sufficient, and we deem it necessary and advisable to supplement that statement.

A. *CHRONOLOGY OF THIS CASE.*

July 25, 1961, summons issued in the State Court, so that complaint was filed no later than that date *(R. 8)*. The complaint attempted to quiet title to federal oil and gas lease 025001. Defendants named were Industrial Gas, Inc., Fidelity Gas Company, Montana-Dakota Utilities Company, Shell Oil Company, L. B. Buchtel, and respondent Reed. Defendants removed to Federal Court

alleging a fraudulent joinder of Industrial Gas, Inc. On presentation of motion to remand petitioner through his counsel of record conceded that Industrial Gas, Inc., was fraudulently joined, and had no interest or claim in the property involved. *(Par. IV-IX, Pet. for Rem., R. 2-7; Order Den. Remand, R. 114; Section 1332, Title 28, U.S.C.A.)* Two companion cases, S-W Company v. Fidelity Gas Company, Montana-Dakota Utilities Company, and Shell Oil Company, and The First National Bank of Denver, Colorado, v. Fidelity Gas Company, Montana-Dakota Utilities Company, and Shell Oil Company, were consolidated for trial.

On *August 1, 1963,* answer of respondent Reed was filed. Federal oil and gas lease 025001, instruments committing the lease to a unit plan of development in what is called Cedar Creek Anticline, and assignments thereof by the lessee subject to a prior working agreement to petitioner were alleged and described *(Answer, R. 116; Stipulation, R. 151-155; R. 135).* In addition, respondent Reed attached photostatic copies of assignment of December 5, 1952, from petitioner to E. L. McElroy, which reserved an interest in petitioner, filed with the Bureau of Land Management on December 12, 1952, and approved March 23, 1953 *(R. 138);* assignment of May 28, 1953, from McElroy to Buchtel filed with the Bureau on August 21, 1953, and approved *(R. 141);* and an assignment of October 28, 1954, from Buchtel to respondent Reed filed with the Bureau November 1, 1954,

and approved December 1, 1954 *(R. 143)*. These instruments, all plain, unambiguous, and unequivocal, were described and attached to the answer filed in the case by respondent Reed *(R. 116)*.

August 12, 1963, pretrial conference was ordered for *September 16 (R. 124)*. *August 21, 1963,* the parties stipulated to trade for examination all documents upon which the parties relied *(R. 125)*. *September 6, 1963,* petitioner by letter to respondent outlined documents upon which petitioner might rely, one of which was a purchase agreement between petitioner and McElroy dated June 17, 1952, a copy of which was never submitted to the District Court before summary judgment. (As discussed hereafter, there was a dispute in prior litigation whether this instrument had been altered or falsified, so that federal lease 025001 may or may not have been originally included as a small part of the 30,000 acres covered by the agreement.) Petitioner also referred in the letter to respondent to the complaint only in Civil No. 1557, United States District Court for the District of Montana, an action brought by petitioner against the same McElroy to cancel or terminate the questionable purchase agreement of June 17, 1952, recited he might rely on that complaint, but again no copy of that complaint was ever submitted to the District Court or relied upon before summary judgment. *(R. 129-130)*. Except for the word description of Civil Action No. 1557 contained in an affidavit filed in the case March 21,

1964, which described the dismissal of that action for lack of diligent prosecution *(Vol. 1, p. 173; Transcript, Docket No. 19639, Ninth Circuit Court)*, the questionable purchase agreement of June 17, 1952, was never again mentioned in this case after the letter of September 6, 1963, or relied upon by petitioner in any of the proceedings prior to the date of the summary judgment of August, 1964.

On *September 16, 1963,* a pretrial conference was held. Certified copies of the documents relied upon by the respondent Reed were submitted to petitioner and the court at the pretrial conference *(R. 223)*. Counsel for petitioner was fully and carefully interrogated concerning the issues, contentions and proof relied upon by petitioner. The questionable purchase agreement of June 17, 1952, was never mentioned. The validity and authenticity of the documents submitted to the court by respondent Reed were admitted and conceded. No issue of assignment invalidity was suggested. Pretrial order issued *October 22, 1963,* with no suggestion of an issue of fact or assignment invalidity. *November 1, 1963,* separate motions for summary judgment were filed *(R. 131)*. Once again respondent Reed recognized the rights reserved by petitioner in the assignment of December 5, 1952, outlined the documents relied upon, and copies of the assignments relied upon were attached (Walker to petitioner *(R. 135)*; petitioner to McElroy *(R. 138)*; McElroy to Buchtel *(R. 141)*; Buchtel to respondent

(R. 143)). Briefs were filed opposing the motions for summary judgment. *November 8, 1963,* there was filed a stipulation of October 28, 1963, with respect to documents agree upon *(R. 151). December 12, 1963,* was a motion by petitioner to modify the pretrial order, and briefs were filed by petitioner in support thereof. Order granting motions for summary judgment issued *August 3, 1964 (244 F. Supp. 327);* form of proposed judgment was served on petitioner *(R. 157-159),* and on *August 31, 1964,* judgment in the form proposed was signed, filed and entered. It should be noted that the judgment grants to petitioner all the rights in the land involved which petitioner had reserved in its prior assgnment of December 5, 1952, to McElroy. Subsequent assignments from McElroy to Buchtel and Buchtel to respondent Reed could not, and do not affect or disturb those prior rights vesting in the petitioner fully protected as indicated *(R. 160-164).* It is significant indeed that the petitioner never at any time in any of the papers, documents, or court hearings referred to, offered the questionable purchase agreement of June 17, 1952, in evidence, nor advised the Court that petitioner was asserting or relying upon it, nor questioned the authenticity or validity of the documents relied upon by respondent, nor raised nor asserted any issue of fact whatsoever. The position taken by petitioner as of the date when summary judgment was granted is described in the subsequent order of Federal District Judge W. D. Murray of June 7,

1965 *(R. 222-223)* denying the motion for new trial as follows:

> "This attempt to question the validity of the assignment from the plaintiff to McElroy is made in this case for the first time on the motion for a new trial. The validity of the assignment to McElroy was not mentioned as an issue in either the pretrial order filed October 23, 1963, or the plaintiff's motion to modify the pre-trial order which was filed December 12, 1963. As a matter of fact, at a pretrial conference, plaintiff's then counsel conceded that the title of all of the defendants in this and the two companion cases was settled by the decision of this court in Cedar Creek Oil and Gas Company, et al., v. Fidelity Gas Co., et al., which was affirmed by the Court of Appeals in 249 F. 2d 277. At that pre-trial conference the attorney for the plaintiff stated that plaintiff in this and the two companion cases was relying on breaches of the Fidelity operating agreements which were alleged to have occurred subsequent to the final judgment in the Cedar Creek Oil and Gas case. The attack on the validity of the assignment of the Walker lease by the plaintiff to McElroy for the first time on the motion for a new trial appears to be an afterthought and that reason alone would warrant the denial of the motion for a new trial."

It is well to note that the prior Cedar Creek case was an action by the petitioner against the same defendants Montana-Dakota Utilities Company, Fidelity Gas Company, and Shell Oil Company, in which petitioner had unsuccessfully tried to quiet title to exactly the same federal oil and gas lease 025001 involved in this litigation *(9th C.C., 1957, 249 F. 2d 277; certiorari denied, 78 S. Ct. 775, 356 U.S. 932, 2 L. Ed. 2d 763)*.

The foregoing chronology illustrates clearly that during the more than three years between the time the

complaint was filed on July 25, 1961, and the date summary judgment was entered on August 31, 1964, petitioner at all times had a full, fair and complete opportunity to present to the District Court any and all claims that the petitioner might have had, as well as any and all evidence upon which petitioner relied. Petitioner conceded and admitted the validity and authenticity of all the documents before the court. Petitioner did not submit any contradictory evidence. No fact issue was raised or presented. His only position with the District Court at that time was a legal position based upon alleged defaults in performance under the base federal oil and gas lease subsequent to the date of the prior Cedar Creek judgment of July 3, 1956. Accordingly, at the time summary judgment was granted there was no issue of fact. The facts were all uncontradicted, undisputed and admitted. The opinion and order of the District Court *(244 F. Supp. 327)* was later affirmed by the Ninth Circuit Court with respect to the companion cases *(349 F. 2d 1020);* and with respect to this case in *363 F. 2d. 879.*

B. *MOTION FOR NEW TRIAL.*

September 9, 1964, through new and different counsel, petitioner for the first time attacked the summary judgment claiming an issue of fact with respect to the validity of the assignment of December 5, 1952, from petitioner to McElroy by reason of the termination of the questionable purchase agreement of June 17, 1952 *(R. 165).* This was the first time such contention was raised

in this case. In view of the chronology of the case outlined above, and the additional facts discussed hereafter, the suggestion in the motion for new trial that petitioner was presenting new evidence which he could not have discovered and presented with reasonable diligence before summary judgment is fantastic and incredible.

August 18, 1953, eight years before the complaint was filed in this case, petitioner filed a complaint in cause No. 27622 in Yellowstone County, Montana, in State Court, against the same E. L. McElroy and one E. A. Markey *(R. 71-77).* This was dismissed *December 16, 1963, for* failure of petitioner to prosecute the action with reasonable diligence *(R. 113).* On *November 4, 1953,* petitioner filed the same form complaint exactly against the same McElroy and the same Markey in Civil No. 1557 in the United States District Court for the District of Montana *(R. 13-19).* This action was dismissed by the United States District Court for the District of Montana on *October 11, 1961,* because of the failure of the petitioner to diligently prosecute *(R. 66).* These two actions filed eight years before the complaint was filed in this case directly involved the validity of the purchase agreement of June 17, 1952, which petitioner alleged was breached by McElroy. The answer in the federal court case denied that the purchase agreement submitted was in fact authentic, alleged that descriptions had been altered and falsified *(R. 58-62).* The dismissal with prejudice was an adjudication on the

merits. *(Rule 41(b) F.R.C.P.)* The plain and unambiguous assignment of December 5, 1952, relied upon by respondent Reed in this case preceded the commencement in 1953 of Civil No. 1557, and neither one of the complaints in these two prior cases filed in 1953 made any reference to, nor attacked, the validity of the assignment of December 5, 1952, upon which respondent Reed relies. On *March 9, 1954,* John Wight filed an affidavit with the Bureau of Land Management attacking the purchase agreement of June 17, 1952, without making any reference whatsoever to the prior assignments to McElroy and Buchtel upon which respondent Reed relies *(see Exhibit B-10, R. 4).* Keeping in mind that petitioner had filed two actions in 1953 attacking the validity of the purchase agreement of June 17, 1952 (but did not in those actions attack or question the validity of the subsequent assignment of December 5, 1952, on which respondent Reed relies); that petitioner had filed a third action (the Cedar Creek case), to quiet title to the same federal oil and gas lease; that he did not rely upon nor assert the purchase agreement in the District Court in this case before summary judgment; that he waited to do so for the first time until the motion for new trial filed by new and different counsel on September 9, 1964; and that he then asserted in the motion for new trial that the questionable purchase agreement of June 17, 1952, was newly discovered evidence of which he was unaware, and which he was unable to present with rea-

sonable diligence during the three-year period between the time the complaint was filed July 25, 1961, and summary judgment August 31, 1964; the Court can readily understand why we label such claims as fantastic and incredible.

Furthermore, the statements in the motion for new trial and supporting papers do not reflect any known evidence that would change the result, and are replete with statements of speculation and conjecture of what they might be able to develop and prove if permitted *(R. 168-173)*.

Present counsel for petitioner entered the case on *March 16, 1965,* at the time set for hearing of the motion for new trial, at which time he presented without supporting facts or affidavits a motion for continuance and discovery through income tax returns. Mailed *April 21, 1965,* was a motion to amend the motion for new trial. Mailed *June 3, 1965,* was a second motion to amend the motion for new trial which incorporated copy of a default judgment in the State Court secured by petitioner against the defunct Industrial Gas, Inc., the corporation which petitioner originally admitted was fraudulently joined as a defendant in this case. What possible application that default judgment in the State Court against Industrial Gas, Inc., would have to this case, has never been demonstrated. In this connection, it should be noted that during the argument on this case before the Ninth Circuit Court of Appeals, counsel for respondent re-

quested permission of the court to argue from, and leave with the court for examination; the original file of the State Court in which the default judgment had been granted against Industrial Gas, Inc. Counsel for petitioner upon being questioned by the Ninth Circuit Court consented. Accordingly, the Circuit Court had the benefit of examining the state Court file.

ARGUMENT

A. *A WRIT OF CERTIORARI IS NOT GRANTED TO REVIEW MATTERS OF EVIDENCE, NOR TO AFFORD A REHEARING ON APPEAL FOR THE BENEFIT OF ANY PARTICULAR INDIVIDUAL.*

This Court in *Magnum Import Co. v. Coty, 262 U.S. 159, 163, 67 L. Ed. 922, 43 S. Ct. 531,* said:

> "The jurisdiction to bring up cases by certiorari from the circuit courts of appeals was given for two purposes: first, to secure uniformity of decision between those courts in the nine circuits; and, second, to bring up cases involving questions of importance which it is in the public interest to have decided by this court of last resort. The jurisdiction was not conferred upon this court merely to give the defeated party in the circuit court of appeals another hearing."

See also: *Rice v. Sioux City Memorial Park Cemetery, 75 S. Ct. 614, 349 U.S. 70, 99 L. Ed. 897.*

B. *ON THE RECORD, DISTRICT COURT HAD NO ALTERNATIVE BUT TO GRANT SUMMARY JUDGMENT.*

Not only did the petitioner fail to come forward in the District Court before Summary Judgment with a disclosure of specific facts showing a genuine issue

for trial, the petitioner conceded in the District Court the validity and authenticity of all the documentary evidence before the court, and relied upon a legal theory not applicable under the admitted facts. There was no contradictory nor conflicting evidence before the District Court. The District Court had no alternative but to grant summary judgment.

Rule 56(e), F.R.C.P.;

First National Bank v. First Bank Stock Co., 1962, 9th C.C., 306 F. 2d 937;

Likins-Foster Monterey Corporation v. United States, 1962, 9th C.C., 308 F. 2d 595 at 599;

Smith v. Stone, 1962, 9th C.C., 308 F. 2d at 18.

C. *ON THE RECORD, THE DISTRICT COURT HAD NO ALTERNATIVE BUT TO DENY THE MOTION FOR NEW TRIAL.*

The record discloses conclusively that during the eight years between 1953 and 1961, when this action to quiet title was commenced, petitioner had prosecuted three separate prior actions in which the same federal oil and gas lease was involved, and in which some of the same parties or their predecessors in interest were involved, and in which the same evidence was involved that petitioner produced for the first time *after* summary judgment in this case. Furthermore through new and different counsel, petitioner endeavored on motion for new trial to change the position he had taken prior to summary judgment. Two of those prior cases were designed to terminate the purchase agreement of June 17,

1952, of doubtful authenticity, and were ultimately dismissed by their two separate courts for lack of diligent prosecution by petitioner. There has never been any factual showing in this case how that questionable purchase agreement of June 17, 1952, could affect or defeat the validity of the subsequent specific assignment of December 5, 1952, from petitioner to one E. L. McElroy, predecessor in interest of respondent Reed. In any event, the questionable purchase agreement of June 17, 1952, was never presented to the District Court prior to summary judgment, and there was never argument to the District Court prior to summary judgment that such agreement if it was valid and existing had any effect on the validity of the plain and unambiguous instruments upon which respondent Reed relies. The third prior action, commonly called the Cedar Creek Case *(Cedar Creek Oil and Gas Company, et al., v. Fidelity Gas Co., et al., 9th C.C., 1957 249 F.2d 277, cert. den. 78 S. Ct. 775, 356 U.S. 932; 2 L. Ed. 2d 763)*, was a quiet title action brought by petitioner and others against some of the same defendants involved in this action, involved the same federal oil and gas lease, and involved similar issues of law and theories of law relied upon by petitioner in the District Court in this case, which prior action was litigated and decided adversely to petitioner.

On moton for new trial in this case, petitioner for the first time asserted in the guise of "newly discovered evidence which he could not have produced with dili-

gence before summary judgment," the same evidence which had been involved in the prior cases, and all of which had been in the possession of, and within the knowledge of, petitioner for at least eleven years prior to the time summary judgment was granted in this case. The District Court was vested with a vast discretion in considering the material presented on the motion for new trial. The District Court exercised its discretion adverse to petitioner. There were ample grounds for doing so — (1) the evidence offered was not "newly discovered"; (2) the evidence could have been produced and presented by petitioner prior to summary judgment with reasonable diligence; (3) the evidence for the most part was wholly speculative and conjectural and unauthenticated and not specific; (4) the evidence offered did not suggest nor indicate that a new trial would change the old result; (5) for the most part the evidence asserted was not competent or material. To deserve a new trial, it was incumbent upon petitioner to show an abuse of that discretion by the District Court. Petitioner failed to show any basis upon which the Ninth Circuit Court could have held an abuse of discretion by the District Court.

Moylan v. Siciliano, 1961, 9th C.C.; 292 F. 2d 704 at 705-706;

Pacific Contact Laboratories, Inc., v. Solex Laboratories, Inc., 9th C.C., 209 F. 2d at 533, cert. den. 75 S. Ct. 26, 348 U.S. 816; 99 L. Ed. 643;

United States v. Bransen, 9th C.C., 142 F. 2d at 235.

D. *NO MONTANA STATUTES WERE INVOLVED PRIOR TO SUMMARY JUDGMENT.*

Under the factual position taken by petitioner in the District Court prior to summary judgment, as well as the legal theory upon which he then rested his case, the partnership and recording statutes of Montana now referred to in the application for the writ had no bearing nor application whatsoever, and were simply not involved in the case. In any event, there has never been any specific factual showing how the filing and recording of the alleged purchase agreement of June 17, 1952, even if it were established that it is an authentic agreement and not a falsified or doctored one as adjudicated in Civil No. 1557 referred to above, could invalidate the subsequent plain and specific assignment of December 5, 1952, on which respondent relies. If the purchase agreement of June 17, 1952, was authentic and valid, and if it was pertinent, the terms and provisions of the agreement were merged in and erased by the terms and provisions of the subsequent and later specific assignment of December 5, 1952, on which we rely.

Humble v. St. John, 72 Mont. 519, 234 Pac. 475.

E. *NO CONFLICT OF DECISIONS.*

The petition recites some thirteen federal court decisions which petitioner says are in conflict wth the judgment in this case. We have read each and every one of these decisions, and they simply do not involve the same

problems. It is elementary that if there had been presented to the District Court prior to summary judgment a factual showing that would constitute a genuine issue of fact, then summary judgment should not have been granted. Such is not the fact situation in this case. In this case, the petitioner prior to summary judgment admitted and agreed and conceded the truth and validity of all the facts that were then before the court, and did not present or assert any conflicting evidence. Before summary judgment, petitioner was simply relying upon a legal theory which petitioner then had which was not a sound legal theory. After summary judgment, by way of motion for new trial submitted through new and different counsel, petitioner changed the factual position and legal position which he had presented to the District Court before summary judgment, and asserted new evidence never presented before. The evidence then submitted, however, did not fulfill the legal or factual requirements laid down by cases in all jurisdictions necessary as a condition precedent to invoke the discretion of the District Court and permit it to grant a new trial.

Of the thirteen decisions of our Federal Courts cited and relied upon by petitioner, we shall select only one which in our opinion demonstrates so conclusively why there is no conflict in view of the particular facts of this case. In *Associated Press v. United States (1945), 326 U.S. 1, 65 S. Ct. 1416, 89 L. Ed. 2013,* summary judgment had been granted by the District Court. It was

affirmed in the Circuit Court. Appeal was taken to the Supreme Court of the United States by the government which contended that there were genuine disputes as to material facts, that the case therefore should have gone to trial, and that summary judgment was not proper. In denying this contention, this Court said in part:

> "* * * None of the appellants has pointed to any disputed facts essential to a determination of the validity or invalidity of the By-Laws and the contract. Admitting the existence of both the By-Laws and the contract, their answers and their affidavits in the summary proceedings defended the legality of the restrictive arrangements, but did not in any instance deny that non-members of AP were denied access to news of AP and of all of its member publishers by reason of the concerted arrangements between the appellants. Nor was it denied that the By-Laws granted AP members powers to impose restrictive conditions upon admission to membership of non-member competitors. The court below in making findings and entering judgment carefully abstained from the consideration of any evidence which might possibly be in dispute. We agree that Rule 56 should be cautiously invoked to the end that parties may always be afforded a trial where there is a bona fide dispute of facts between them. (Citing case.) There was no injury to any of the appellants as a result of the summary proceedings since, for reasons to be indicated, the restrictive arrangements which appellants admitted, were sufficient to justify summary action by the court at that stage of the case." *(65 S. Ct. at 1418.)*

In this case there was no issue of fact before summary judgment.

Petitioner likewise states in his application for the writ that the decision is in conflict with prior decisions of the Ninth Circuit Court. Again we have read all of

the cases cited, and none of them has any bearing whatsoever upon the facts or record background of this case. For example is *Gile v. Duke, 1925, 9th C. C., 5 F.2d 952,* in which the court simply held that a plaintiff may be permitted to supply defects and omissions in proof after a motion for nonsuit has been presented. Whether this should be done, of course, rests within the discretion of the District Court.

It would unduly extend this brief to refer to or discuss the other cases cited. Suffice it to say at this point that they simply do not involve the same factual background, or record status involved in this case.

CONCLUSION

The brief of petitioner and argument in support of the request for issuance of a writ show clearly that the case is not one of broad application and importance; that it does not deal with important legal principles as to which courts are in conflict; but rather that it involves merely an attempt by petitioner to obtain a second appelate review of an adverse decision against him.

For the foregoing reasons, we respectfully submit that the petition for a writ of certiorari should be denied.

GALE CROWLEY
P. O. Box 2529
Billings, Montana 59103
Attorney for Respondent
Collins G. Reed
500 Electric Building

PROOF OF SERVICE

I, CALE CROWLEY, one of the attorneys for Collins G. Reed, respondent herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 17th day of November, 1966, I served three copies of the foregoing Brief of Respondent Reed in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit, as follows:

On Mondakota Gas Company, a corporation, petitioner, by mailing copies in duly addressed envelope, with first class postage prepaid, to its attorney of record, as follows:

To: Daryl E. Engebregson, Esq., Attorney for Petitioner, 307 Fratt Building, Billings, Montana.

CALE CROWLEY
Attorney for Respondent
500 Electric Building,
P. O. Box 2529
Billings, Montana 59103

Office-Supreme Court, U.S.
FILED
DEC 16 1966
JOHN F. DAVIS, CLERK

LIBRARY
SUPREME COURT, U. S.

In the Supreme Court of the United States

October Term 1966

No. 742

MONDAKOTA GAS COMPANY,
a corporation,

Petitioners,

vs.

COLLINS G. REED and MRS. COLLINS G. REED,
et al,

Respondents

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Reply Brief of Petitioner

DARYL E. ENGEBREGSON
307 Fratt Building
Billings, Montana
Attorney for Petitioner

INDEX

REBUTTAL ARGUMENT 1
JURISDICTION 1
STATUTES INVOLVED—ARGUMENT 1-5
CONCLUSION 6

CASES CITED

Aetna Casualty & Surety Co. v. Yeatts, 122 F 2d, 350 6
Guerin v. Sunburst Oil Co., 68 Mont. 129, P 2d, 619 5
Humble v. St. John, 72 Mont. 519, 234 Pac. 475 4
Ishikawa v. Acheson, Secretary of State, 90 F. Supp. 713 6
Kelly v. Grainey, 113 Mont, 520, 129 P 2d, 619, 629 5
State ex rel Begeman v. Napton, 10 Mont. 369, 25 P. 1045 5
State ex rel Brass v. Horn, 36 Mont. 418, 93 P. 351 5
State ex rel Haggarty, et al, v. Rafn and Blackfeet Tribe, et al, Mont. 304, P. 2nd 918 5
U. S. v. Hardue Hayaski, 282 F. 2d 599, 601 5
U. S. v. Viewcrest Garden Apts. (1959) 268 F. 2d 380 ..... 3, 5

RULES AND OTHER AUTHORITY

	Page
Rule 56—F.R.C.P.	1
Rule 27—F.R.C.P.	5
Section 63-204, Revised Codes of Montana, 1947	4
Section 73-201, R.C.M., 1947	2
Section 73-202, R.C.M., 1947	2, 3
Section 93-3005, R.C.M., 1947	2
Section 93-6205, R.C.M., 1947	2
28 U.S.C.A. 1652	4, 5

REPLY BRIEF OF PETITIONER

In the Supreme Court of the United States

October Term 1966

No. 742

MONDAKOTA GAS COMPANY,
a corporation,

Petitioner,

COLLINS G. REED,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Reply Brief of Petitioner

DARYL E. ENGEBREGSON
307 Fratt Building
Billings, Montana
Attorney for Petitioner

REBUTTAL ARGUMENT

JURISDICTION

The Hon. William J. Brennan, Jr., Associate Justice of the Supreme Court of the United States, extended the time for filing the petition for Writ of Certiorari herein to and including November 4, 1966. (Page 22—Appendix to Petition.) The Petition was filed on November 3, 1966. This court has jurisdiction in this matter.

STATUTES INVOLVED—ARGUMENT

Summary judgment was granted in favor of Reed by the District Court under **Rule 56, Fed. Rules of Civil Procedure,** subdivision (e) of which provides in part that a defense must be shown and "summary judgment, if appropriate, shall be entered against him."

Petitioner contends that summary judgment should not have been granted as there was an issue for trial. The District Court held that dismissal of two prior cases against McElroy to cancel a recorded contract describing the lease herein was res judicata. The court's ruling, in effect, attempts to allow a subsequent transfer to prevail in face of the reservation of title in Petitioner herein by a recorded contract. The Respondent claims the recorded agreement of June 17, 1952, was never before the District Court. This is inaccurate and misleading, as the Respondent caused the agreement to be before the court in order to rely upon it to apply the doctrine of res judicata. Respondent stated on Page 18 of his brief in the Circuit Court as follows: "Each complaint attached as an exhibit the purchase agreement of June 17, 1952, * * *." The complaints referred to include cause No. 1557, and it was

held to be res judicata in this case. (Appendix to Petition, pages 19-20.)

In order to be res judicata, there had to be proof that the same claim was made between the same parties or their privies. Since the proof was there of the agreement, the prior complaint, and the order of dismissal, in the same District Court that entered the summary judgment, it is obvious that the recorded agreement and Lis Pendens were before the court, which proved the prior recording of the agreement so that Reed could not be a holder without notice and an issue exists precluding summary judgment.

The trial court found res judicata by dismissal of cause No. 1557. The trial court would have had before it the proof of recording and Lis Pendens. Compare Respondent's present position on page 6 of his Brief in opposition and his position in the Circuit Court Brief, supra. He is taking contradictory positions.

The proof supplied by one party can prove the opposing party's case. The Respondent supplied the issuable fact. This involved application of the Montana recording law, ie. **Section 73-201 R.C.M. 1947.** providing constructive notice to subsequent purchasers, **Section 73-202 R.C.M. 1947,** providing thtt the first instrument prevails, and **Sections 93-3005 and 6205 R.C.M. 1947,** provide for a Lis Pendens in an action affecting title to real property and constituting notice. (Pages 3-4 Petition herein.)

None of the instruments relied upon by Reed were ever recorded in the Clerk and Recorder's office in Fallon County, Montana, where the property is located.

There is no federal recording law as it is governed by

the state recording law. **U. S. vs. Viewcrest Garden Apts., 9th Circuit, 268 F 2d 380.** (Petition, pages 13-14.)

The subsquent judgment in the Industrial Gas Case (Appendix to Petition—pages 23-29) shows that McElroy assigned to Industrial Gas subject to the terms of the agreement of June 17, 1952, (page 25, para. 8 and 9; page 26-27, para. C) and the judgment cancelled the agreements. McElroy assigned, in 1953, to Industrial Gas so that Industrial Gas became the conditional purchaser with Petitioner and rendered cause No. 1557 moot.

The omission by petitioner or its counsel in 1953 to obtain dismissal without prejudice, or to obtain a stipulation to dismiss without prejudice, does not alter the true facts that McElroy tried to assign the property rights to two parties in face of a recorded agreement reserving title in the Petitioner. That recorded agreement was before the trial court.

In the Circuit Court, Respondent attempted to collaterally attack the judgment in favor of Petitioner vs. Industrial Gas, which shows the recorded chain of title. Respondent presented a part of the state court file but omitted some parts. Petitioner supplied the omitted portions and the Circuit Court ordered, in effect, that Respondent could not collaterally attack that judgment.

Section 73-202 R.C.M. 1947 provides that the instrument first recorded prevails over those subsequently recorded. None of Respondent Reed's chain of title is recorded. The agreement of 1952 with McElroy, the agreement of 1953 with Industrial and the judgment cancelling these agreements are all recorded in the manner provided by State and Federal law. At the time of judgment the court had an issue for trial before it.

The Respondent herein attempts to invoke **Humble v. St. John, 72 Mont. 519, 234 Pac. 475,** a part of which case holds that a subsequent deed is an abrogation, or showing of performance, of a prior agreement. The **Humble** case is not applicable and is distinguished on the facts. In **Humble,** there was a claimed error in named grantees. However, in the case before this Court, the contract involves many tracts of land and leases, all subject to a reservation of title in Petitioner herein until the full price was paid by McElroy. McElroy didn't pay but assigned to Industrial Gas and when Industrial did not perofrm, the agreement was terminated. (App. 23-29.)

The motion for new trial and for discovery pending appeal is supported by Affidavits showing that McElroy presented a new and different alleged assignment of the lease in question to corporate officers in California wherein McElroy omitted the clause stating it was subject to the conditional sale agreement. The Respondent has not shown there was corporate authority to sign this second assignment. McElroy pulled a fast one by obtaining the second assignment and by then assigning to his partner who then assigned to a relative. The trial court, by having the complaint in No. 1557 before it knew the conditional contract was not performed because termination was sought, ergo, a showing that consideration had not been paid for the subsequent assignment upon which Reed relies. The motion for new trial shows the issue of consideration, the newly discovered fact of relationship of the parties and invokes the presumption of knowledge between partners. **Sec. 63-204 R.C.M. 1947.**

The law of Montana regarding prior recordings of instruments was not followed. (Pet page 6(1); 28 U.S.C.A.

1652) Case No. 1557 was rendered moot by an agreement which appears in the subsequent recorded judgment; (See State ex rel Haggarty, et al v. Rafn & Blackfeet Tribe, et al, Mont. 304 Pac. 2nd, 918, Vol. 13, No. 9492 of the Montana Advance Sheets (1956); State ex rel Brass v. Horn, 36 Mont. 418, 93 P. 351; and State ex rel Begeman v. Napton, 10 Mont. 369, 25 P. 1045, to the effect that the court is without jurisdiction as there is no controversy.) and the trial court apparently based its decision on the unrecorded assignments from McElroy to Buchtell to Reed thereby disregarding the 9th Circuit case of **U. S. v. Viewcrest Garden Apts., (1959) 268 F 2d 380.** The trial court abused its discretion in not granting discovery pending the motion for new trial or appeal **(Rule 27 F.R.C.P.)** after it was pointed out to the trial court that it had before it the agreement relied upon when it relied upon dismissal of Case No. 1557 as being res judicata. Petitioner contends the trial court did not follow the state law and its decision is in conflict with other cases.

> "In federal practice any question which has been presented to the trial court for a ruling and not thereafter waived or withdrawn is preserved." **U. S. v. Hardue Hayaski, 282 F. 2d 599, 601.**

> "Thus, even if we consider defendants' testimony as showing that she received plaintiffs' property from Mae J. Kelly in good faith in consideration * * *, she was not a bona fide purchaser so as to defeat plaintiffs' title." **Kelly v. Grainey, 113 Mont. 520, 129 P. 2d 619, 626.**

Also, see the exert from **Guerin v. Sunburst Oil Co., 68 Mont. 365, 218 P. 949 at 951,** on pages 12-13 of the Petition herein.

". . . The showing of the alleged newly discovered evidence need not present an air-tight case. It suffices if a showing is made of sufficinet new facts to afford a basis for believing that, given an opportunity, the concrete proof could reasonably be expected to cover the gaps and to fill in the details. I believe such a showing has been made here, and it can be left to the matter of proof to supply the specific details." **Ishikawa v. Acheson, Secretary of State, 90 F. Supp. 713.**

"'To the federal trial judge, the law gives ample power to see that justice is done in causes pending before him; and the responsibility attendant upon such power is his in full measure. While according due respect to the findings of the jury, he should not hesitate to set aside their verdict and grant a new trial in any case where the ends of justice so require.'"
Aetna Casualty & Surety Co. v. Yeatts, 122 F. 2d 350.

CONCLUSION

This case illustrates how, when other claims were previously involved, a trial court can be lead to overlook an agreement attached to a complaint and to attach significance to an order of dismissal, to overlook the recorded contract and rely on unrecorded instruments, and to overlookthe fact that an assignee (Reed) receives only what the assignor (McElroy) had, ie. an unrecorded instrument subject to the terms and conditions of a recorded contract, thereby not following the established Montana law.

Petitioner respectfully contends that the ends of justice require the granting of the Writ.

DARYL E. ENGEBREGSON
Attorney for Petitioner
307 Fratt Building
Billings, Montana 59103

PROOF OF SERVICE

I, DARYL E. ENGEBREGSON, attorney for Petitioner herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on December 13, 1966, I served six copies of the foregoing Reply Brief on Respondent Reed by mailing said copies in a duly addressed envelope, with first class postage prepaid, to his attorney of record: Cale Crowley, attorney at law, 500 Electric Building, P. O. Box 2529, Billings, Montana.

DARYL E. ENGEBREGSON
307 Fratt Building
Billings, Montana 59103
Attorney for Petitioner